No. 76-1021

Supreme Court, U. S.
FILED
APR 5 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

FLAV-O-RICH, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In its initial decision and order, issued on August 19, 1974, the Board found that petitioner (hereinafter, the Company) continued, in essentially the same form, the business operation of the Leatherwood Company, and thus was Leatherwood's "successor" and under a duty to recognize and bargain with the Union[1] which represented the operation's employees (Pet. App. 17a). The Board rejected the Company's contention that it had a good faith doubt as to the Union's majority status at the time it took over the operation (Pet. App. 20a, n. 4). Accordingly, it held that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as

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[1]Chauffeurs, Teamsters and Helpers Local Union No. 175, affiliated with the International Brotherhood of Teamsters.

amended, 61 Stat. 140, 29 U.S.C. 158(a)(5) and (1), by refusing to recognize and bargain with the Union after taking over the operation on November 1, 1973, and by refusing, on and after November 19, 1973, to bargain concerning the effects of the closing of a processing plant (Pet. App. 22a). The Board ordered the Company, *inter alia*, to bargain with the Union (Pet. App. 11a, 23a-25a).

2. On October 3, 1974, the Company filed with the Board a Motion to Abate Proceedings and Reopen Record which alleged that it "now has a good faith doubt" of the Union's representative status. The doubt was based on a poll of the employees, conducted by the Company on September 16, 1974, which assertedly showed that the Union did not then represent a majority of the employees. The Company requested the Board to abate the unfair labor practice proceeding pending the outcome of representation election which the Company was seeking, or to reopen the record of the unfair labor practice proceeding for the purpose of introducing the poll and other evidence of the Union's alleged loss of majority (Pet. App. 3a-4a). The Board, on October 31, 1974, denied the motion (Pet. App. 27a).

3. On March 1, 1976, the court of appeals upheld the Board's finding that the Company was a successor to Leatherwood and thus had a duty to bargain with the Union (Pet. App. 29a). However, the court held that the Board's order denying the Company's motion to abate failed to disclose a "reasoned basis" for that action as required by the Administrative Procedure Act (5 U.S.C. 557(c)) and judicial rulings (Pet. App. 33a-34a). Moreover, the motion had been considered and decided under an "impermissible delegation of authority" to chief counsel and had not been "legitimately reviewed by members of the Board" (Pet. App. 34a-36a). The court remanded

the case to the Board for corrective action (Pet. App. 36a).

4. On remand, a duly constituted, three-member panel of the Board considered the Company's motion to abate, and issued a supplemental decision and order fully explaining its reasons for denying the motion and reaffirming the original decision and order (Pet. App. 3a-9a). The Board noted that, under settled principles, "a successor employer is bound by a presumption of continued majority support 'unless it demonstrates that the [incumbent] union no longer represents a majority of employees on the date of the refusal to bargain, or that the refusal to bargain was grounded on a good faith doubt of the union's majority status' " (Pet. App. 5a). The Board further noted that the evidence proffered in the Company's motion did not relate to any "doubt" of the Union's majority status at the time of the refusals to bargain in November 1973. Rather, it was a "doubt" assertedly based upon a lack of majority support revealed in a poll of employees conducted almost a year after the earlier unlawful refusals to bargain. The Board concluded (Pet. App. 6a-7a):

> Under these circumstances, to allow an employer to rely on a union's subsequent failure to retain majority status would result in permitting the employer "to profit from [its] own wrongful refusal to bargain." Similarly, were we to accede to Respondent's alternative request and order an election when it is claimed that a union has lost its majority support subsequent to or
>
> > during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to

> union membership indefinitely to postpone performance of their statutory obligation. * * *[2]

The court of appeals summarily enforced the Board's supplemental order (Pet. App. 2a).

5. Petitioner does not here question the Board's finding that it is a successor to Leatherwood, that it had no good faith doubt of the Union's majority at the time it assumed Leatherwood's operation, and that therefore it violated Section 8(a)(5) and (1) of the Act by then refusing to recognize and bargain with the Union. Petitioner's sole contention is that the Board was required to suspend or vacate its bargaining order because of the Union's alleged subsequent loss of majority status.

In *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, this Court recognized that an unlawful refusal to bargain contributes to an erosion of union support and that allowing an employer to rely upon a subsequent loss of majority would permit him to profit from his own wrong. Thus, a bargaining relationship rightfully established is entitled to a "fair chance to succeed" before employer challenges to the union's majority status will be entertained. 321 U.S. at 705; and see *National Labor Relations Board* v. *Mexia Texile Mills, Inc.*, 339 U.S. 563, 568. Here, the Company, since taking over operations in November 1973, has steadfastly refused to recognize and bargain with the Union and has therefore deprived the bargaining relationship of any chance to succeed. In these circumstances, the Company cannot rely on the loss of majority purportedly revealed in its September 1974 poll

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[2]Quoting from *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 705.

of employees to relieve the Company of its statutory obligation.[3]

Contrary to petitioner's contention (Pet. 10), *Franks Bros.* is not limited to instances where "outrageous" or "pervasive" unfair labor practices have occurred.[4] And *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, relied on by petitioner (Pet. 13-14), is wholly inapplicable. That case involves the propriety of the issuance of a bargaining order in an initial recognition situation. It has no bearing on whether an existing obligation to recognize an incumbent union should be terminated because of the union's alleged loss of majority support.

In sum, as in *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. 2d 755, 759-760 (C.A. 4), "[t]he case here is not one where the employer has complied with the order of the Board to bargain and later desisted because of belief that the majority status of the union no longer existed * * * [but rather] is one where the employer has adopted an intransigent attitude and has refused to obey the order of the Board from the beginning * * *."

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[3]Petitioner's assertion (Pet. 4, n. 2) that it was unable to challenge the Union's majority at the time it assumed the operation is in error. Petitioner could have obtained a Board election had it been able to show, at that time, a reasonable objective basis for believing that the Union had lost its majority status. See *United States Gypsum Co.*, 161 NLRB 601; *Zim's Foodliner, Inc.* v. *National Labor Relations Board*, 495 F. 2d 1131, 1139 (C.A. 7), certiorari denied, 419 U.S. 838.

[4]Petitioner's description of the facts of *Franks Bros.* (Pet. 10) is not drawn from this Court's opinion in that case. In particular, the Court did not describe the unfair labor practices there as "outrageous" or "pervasive." In fact, it found them "unnecessary to be detailed" in the opinion. 321 U.S. at 703.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Acting Solicitor General.**

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

APRIL 1977.

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*The Solicitor General is disqualified in this case.